



**FINDINGS OF FACT**

Claimant was employed by respondent as a program facilitator. His job duties were to provide full assisted living to clients of respondent. Claimant worked the overnight shift, ending at 8:00 a.m. Claimant would assist clients bathing, would cook for them, and, when necessary, would assist clients getting into and out of wheelchairs. On Thursday, February 19, 2009, claimant was assisting the seven clients in the home that claimant was assigned to, helping them to get up in the morning. Claimant testified that as he helped one of the clients get into a wheelchair, claimant felt a pinch in his neck and back. This occurred at approximately 6:30 a.m. There were no other witnesses to the incident, and the client claimant was working with would not be capable of testifying about the reported injury. Claimant completed the remainder of his shift and went home without reporting the accident.

The next day was claimant's birthday, and claimant had earlier arranged to be off work. Claimant testified that he spent the day using ibuprofen and putting ice and heat on his neck and back. Claimant sought no medical treatment that day. The morning of February 21, claimant woke up, unable to get out of bed. However, claimant stated that after he got up, the numbness in his back and the pain went away. Claimant then began his regular duties, cleaning at home, including dusting. As claimant was bending, while dusting his entertainment center, he experienced pain in his low back. Claimant went to the Memorial Hospital emergency room (ER) and reported the incident. The admission records from the ER on February 21, 2009, discuss the injury to his low back and the dusting activity while at home. The records do not discuss a work-related injury and do not mention claimant's neck.

Claimant testified that he then went home and contacted Irvin Jones, his supervisor, and told him of the incident with the client on Thursday, February 19, 2009, alleging that he told Irvin that he experienced a pinch in his neck. Claimant agreed on cross-examination that he may have told Irvin that the pain started when he was cleaning. He was told to follow up with Lydia Rosline at respondent's office the following Monday, which he did. Claimant returned to the ER on February 23, and was then referred for an MRI and eventually underwent surgery. The ER records from February 23 discuss claimant's low back pain and reference the lifting incident with the client on the previous Thursday, February 19, 2009. The report does not mention claimant's neck.

When asked why he did not immediately report the work accident, claimant testified that he was either embarrassed or confused or feared being fired from his job. Claimant agreed that he was unaware of any employee being disciplined or terminated from respondent for filing a work-related injury claim. He also admitted that he had never been intimidated by anyone with respondent so as to deter him from filing or pursuing a workers compensation claim.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>4</sup>

In this matter, not only is claimant's testimony at times contradictory, but the medical records created contemporaneous with his alleged accident and the records created shortly thereafter contradict each other. Claimant failed to advise the ER that his accident occurred on the date alleged until after he gave a completely different version of when, where and how he was injured. It is claimant's burden to prove his entitlement to the benefits claimed. Here, the ALJ found that claimant had failed in that burden. The Board agrees. The denial of benefits herein is affirmed.

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<sup>1</sup> K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>4</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed, as claimant has failed to prove by a preponderance of the credible evidence that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The denial of benefits in this matter is affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated February 15, 2011, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott M. Price, Attorney for Claimant  
Darin M. Conklin, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge